IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAMIDULLAH, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 10-CV-758 (JBD)
ROBERT GATES, *et al.*,	)	
Respondents.	)	

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Respondents demonstrated in their opening brief that this Court has no jurisdiction to review the instant habeas petition. Despite Petitioner's alleged status as a juvenile, review is barred by Section 7 of the Military Commissions Act of 2006 ("MCA"),[1] Pub. L. No. 109-366, 120 Stat. 2600 (2006), which makes no distinction based on the age of the belligerent. *See* 28 U.S.C. § 2241(e)(1). As Respondents explained, Congress was aware of the enemy's use of juvenile fighters in this armed conflict but took no step to exclude minors from the jurisdictional bar of Section 7. In fact, other provisions of the MCA confirm that Congress did not intend to depend the application of Section 7 on the age of the belligerent.

As further demonstrated in Respondents' opening brief, the D.C. Circuit's constitutional analysis in *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), controls this case. *Maqaleh* upheld the constitutionality of Section 7 as applied to alien detainees held at Bagram Airfield. Respondents have shown that none of the factual predicates of *Maqaleh* has changed. Also, none of the factors for determining the extraterritorial application of the Suspension Clause – as

[1] As used in this brief, the term "MCA" refers to the MCA of 2006, not the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009). The MCA of 2009 has no impact on Respondents' arguments made in support of their motion to dismiss.

articulated by the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008), and applied by the D.C. Circuit in *Maqaleh* – depends in any way on the age of the detainee.

Petitioner has failed to rebut Respondents' showings. He makes no attempt to address the jurisdictional bar of Section 7 other than to say that Section 7 is unconstitutional. Although he claims that the factual predicates of *Maqaleh* have materially changed, his only support are media speculations regarding the United States' alleged plans with respect to the detention facilities at Bagram Airfield – all of which are directly rebutted by Respondents' declarations. As with the *Maqaleh* petitioners, Petitioner also argues that the military's failure to transfer him to Guantanamo Bay, Cuba evidences an intent to evade judicial review. The Court of Appeals, however, has already rejected such an argument.

Petitioner further argues that his alleged juvenile status affects the reach of the Court's habeas jurisdiction. According to Petitioner, this Court should exercise habeas jurisdiction over alien juveniles held at Bagram because of policy considerations underlying domestic and international laws regarding the involvement of children in armed conflicts. In Petitioner's view, once an alien is determined to be a juvenile by a habeas court, the military should release him without regard to his threat to the United States or its allies.

As discussed below, to the extent Plaintiff's jurisdictional argument is premised on the idea that juvenile belligerents are not detainable, he is wrong. Not only is the use of juveniles by our enemy in this war well-documented, but the detention of juveniles is also consistent with historical and contemporary practice of other nations. It is a necessary and accepted incident of warfare. More importantly, as noted above, the reach of the Suspension Clause does not turn on the age or even on the detainability of the alien belligerent. And, because the Court of Appeals

has already applied the *Boumediene* factors to hold that the writ does not extend to Bagram, the jurisdictional question before this Court is a narrow one: whether extending the writ of habeas corpus to alien juveniles at Bagram would raise the same obstacles that the Court of Appeals found sufficient to preclude the jurisdiction of federal court in *Maqaleh*. The answer is clearly yes. Accordingly, this Court should hold that it has no jurisdiction in this case.

ARGUMENT

I. *MAQALEH V. GATES* IS CONTROLLING ON THE JURISDICTIONAL QUESTION.

A. The Detention of Belligerents at Bagram Is Not Intended to Evade Judicial Review.

In their opening brief, Respondents demonstrated that there is no material difference in the factual predicates of *Maqaleh* and this case, and that Petitioner's new allegations – also raised by the *Maqaleh* petitioners on remand – about the United States' alleged attempt to use Bagram to evade judicial review are unavailing. *See* Respondents' MTD at 13-18. The declaration of Deputy Assistant Secretary of Defense Lietzau confirmed what Respondents have previously informed the Court of Appeals in *Maqaleh* – that the United States has no intent to remain at Bagram or to hold detainees there beyond the cessation of hostilities with the Taliban, al-Qaeda, and associated forces. *See* Lietzau Decl., ¶ 10. Vice Admiral Robert S. Harward similarly confirmed that "[t]he United States' use of Bagram Airfield was and is necessitated by its ongoing military operations against al Qaeda and Taliban forces, and associated forces." Harward Decl., ¶ 2. Bagram Airfield exists only to support the current war, and the United States has no *de facto* or *de jure* sovereignty over the Airfield.

Rather than responding to these sworn statements, Petitioner cites prior media

speculations regarding United States' plans about Bagram, including an alleged possible plan to "send militants from outside Afghanistan to Bagram." Petr's Opp'n at 7-9. Petitioner also posits that the United States' entire detention policy since the war began is premised on an attempt to evade judicial review. With respect to his own detention, Petitioner argues that his situation differs from that of the *Maqaleh* petitioners because he was not captured until two months after the Supreme Court's decision in *Boumediene*. Thus, whereas the complex history of Guantanamo detainee habeas litigation might have negated any inference of an attempt to evade judicial review with respect the *Maqaleh* petitioners' detention at Bagram, Petitioner argues that the military's decision not to transfer him to Guantanamo was obviously motivated by the fact that the Supreme Court had determined that the writ extends there. *See* Petr's Opp'n at 11-12.

Petitioner's speculation is unfounded. Even accepting as true his allegation that he was captured in South Waziristan – the mountainous region of northwest Pakistan that borders Afghanistan – there would be nothing suspicious about the military's decision to detain him in a theater level internment facility closest to the point of capture rather than transferring him thousands of miles away to Guantanamo, where the Executive had expressed an intention to close the detention facility there long before *Boumediene* was decided.[2] Moreover, the conduct of detention operations in the context of an ongoing armed conflict is "by universal agreement and practice an important incident of war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004) (plurality opinion). The purpose of Petitioner's detention at the theater level internment facility at Bagram, as well as the detention of other belligerents captured during the armed conflict, is

[2] *See Bush Speaks of Closing Guantanamo Prison*, New York Times (May 8, 2006) (*available at* http://www.nytimes.com/2006/05/08/washington/08bush.html?fta=y) (last accessed Feb. 14, 2011).

not to evade judicial review, as asserted by Petitioner (*see* Petr's Opp'n at 12). Rather, it is "to prevent [them] from returning to the field of battle and taking up arms once again." *Hamdi* 542 U.S. at 518 (plurality opinion); *see also* Harward Decl. ¶ 7 ("The detention of these individuals prevents them from returning to the battlefield and denies the enemy the fighters needed to conduct further attacks and to perpetrate hostilities against innocent civilians, U.S. and coalition forces, and the [Government of the Islamic Republic of Afghanistan].").

Moreover, despite Petitioner's emphasis on his alleged place of capture, it is irrelevant to the jurisdictional inquiry whether Petitioner was captured in South Waziristan as he alleges, or in Afghanistan, as Department of Defense's record indicates, *see* Harward Decl., ¶ 15. The Court of Appeals has already rejected the *Maqaleh* petitioners' similar claim that their capture outside Afghanistan weighed in favor of extending the writ to Bagram. Instead, as the Court of Appeals found, the relevant fact was that the *Maqaleh* petitioners, like the petitioners in *Boumediene* and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), were captured outside the United States, and thus, their apprehension abroad "would appear to weigh against the extension of the writ." *Maqaleh*, 605 F.3d at 97-98.

The practical realities of the war also highlight the flaw in Petitioner's argument that the military should either detain him at the place of capture or transfer him to the United States or another location where habeas attaches. This argument presumes that the military has detention facilities in each exact location in which it may capture individuals engaged in hostilities against the United States or its allies. The argument also ignores the reality that our enemy is not necessarily based in Afghanistan. As previously explained by General David Petraeus, for example, al-Qaeda "is a syndicate of extremist organizations – some of which are truly transnational extremists. . . . They do come in and out of Afghanistan, [and are] not based *per*

se in Afghanistan."[3]

B. The Practical Obstacles of Extending the Writ to Bagram Remain Unchanged.

Petitioner argues that because the Department of Defense has a stated policy of having open and transparent administrative Detainee Review Board ("DRB") proceedings at Bagram and because Afghan trials are now being conducted at Bagram, the United States can no longer argue that habeas proceedings for Bagram detainees would compromise the military's mission. *See* Petr's Opp'n at 12-13.

Petitioner is wrong. Administrative proceedings conducted within an internal military system do not pose the same practical obstacles as civil litigation conducted at federal courts in Washington, D.C. The experience of the Guantanamo habeas litigation – which does not involve counsel access in a theater of war – demonstrates that the burden of litigating even a few cases is substantial, given the evidentiary and discovery requirements that are imposed on the military's intelligence, detention, and war-fighting apparatus.

As for Afghan trials being conducted at Bagram, that too does not undermine the Court of Appeals' prior conclusion that practical obstacles of extending the writ to Bagram strongly counsel against the extension. As part of the United States' overall effort to transition detention operations to the Afghan government, the United States had assisted the Afghan government in improving the Afghan legal process for the criminal prosecution of detainees held at Bagram. Lietzau Decl. ¶ 6. The fact that such criminal trials under Afghan law are now occurring at Bagram merely demonstrates that the Afghan government is conducting quintessentially

[3] *See* Transcript: David Petraeus on CNN's "State of the Union" (*available at* http://archives.cnn.com/TRANSCRIPTS/0905/10/sotu.01.html) (last accessed Feb. 14, 2011).

sovereign acts on Bagram Airfield, making it even clearer why Bagram is readily distinguishable from Guantanamo and bolstering the Court of Appeals' conclusion that extending habeas to Bagram could complicate U.S.-Afghan relations. *See Maqaleh*, 605 F.3d at 99.

The practical obstacles associated with conducting habeas litigation in a theater of war by a U.S. court, on the other hand, remain the same. As the Court of Appeals previously noted, "[i]t is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war," and "petitioners cannot credibly dispute[] that all of the attributes of a facility exposed to the vagaries of war are present in Bagram." *Id.* at 97. That the Afghan government has undertaken the responsibility of carrying out its own criminal trials, and has now done so at Bagram, where the accused are housed, by no means suggests that the vagaries of war no longer exist. Indeed, in 2010, Bagram Airfield was attacked 29 times, the last one being on December 30, 2010, with insurgents firing two rockets into Bagram Airfield.[4] Bagram remains an active war zone, a factor that the Court of Appeals held weighs more heavily in favor of Respondents than even the post-WWII situation in *Eisentrager*, 339 U.S. at 763. *See Maqaleh*, 605 F.3d at 97. Accordingly, the Court of Appeals' prior analysis on the practical obstacles factor remains accurate today.

C. The Factor Regarding Process Received by Bagram Detainees Has Not Changed to Alter the Court of Appeals' Conclusion That Habeas Does Not Extend to Bagram.

In their opening brief, Respondents demonstrated that the Department of Defense ("DoD") has put in place more robust procedural safeguards for determining detainee status than

[4] *See Taliban Fires Rockets Into Main US Base Near Kabul* (*available at* http://www.aaj.tv/2010/12/taliban-fires-rockets-into-main-us-base-near-kabul) (last accessed Feb. 14, 2011).

the procedures previously considered by the Court of Appeals in *Maqaleh*. As DoD notified Congress when adopting the new procedures, "[t]he enhanced review procedures significantly improve the Department of Defense's ability to assess whether the facts support the detention of each detainee . . . the level of threat the detainee represents, and the detainee's potential for rehabilitation and reconciliation." Ex. B to Harward Decl. at 1. "The modified procedures also enhance the detainee's ability to challenge his or her detention." *Id.* As Respondents demonstrated, these enhanced procedures can only lend additional support for the Court of Appeals' conclusion that the Suspension Clause does not extend to Bagram Airfield.

In response, Petitioner challenges the DRB process as an inadequate substitute for habeas review, particularly when applied to juveniles. *See* Petr's Opp'n at 13-16. Respondents, however, have never taken the position, either before the Court of Appeals or now, that the procedures at Bagram constitute effective and adequate substitute for habeas corpus within the mandate of the Suspension Clause. *Cf. Boumediene*, 553 U.S. at 771-72 (determining whether Section 7 of the MCA stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus to Guantanamo Bay detainees through the Detainee Treatment Act). Rather, the adequacy of process at Bagram is but one component of the multi-factor test articulated in *Boumediene* for determining the reach of the Suspension Clause, and under that analysis as applied to Bagram, the adequacy of process consideration is insufficient to compel the conclusion that the writ extends there.

Petitioner also argues that the DRB procedures are biased because the Board is more likely to release Afghans as opposed to non-Afghans. And, whereas Afghan detainees are released as soon as practical once the Board determines that they do not meet the criteria for

internment, a non-Afghan detainee so similarly determined is not released into "the wilds of Afghanistan," but rather, his release requires the approval of the Deputy Secretary of Defense or his designee. Petr's Opp'n at 14. There is no basis for Petitioner's speculation of bias, as the United States has no desire to detain anyone longer than necessary, whether or not the detainee is a citizen of Afghanistan. To be sure, non-Afghans are treated differently from Afghans when being released. But that is due to the fact that the release of non-Afghan detainees into the Afghan sovereign territory reasonably could be expected to create tensions with the host government. By practical necessity, DoD first needs to allow diplomatic arrangements to be made in order to repatriate a non-Afghan to his home country or to find another appropriate disposition. *See, e.g., Khan v. Obama*, 10-CV-535 (RWR) (docket no. 7) (Government's response to order to show cause; informing the Court that the petitioner, a citizen of Pakistan, did not meet the criteria for internment and that DoD, with the assistance of the Department of State, was undertaking steps to effect the petitioner's repatriation to Pakistan for release). These considerations regarding the release of non-Afghan detainees say nothing about the fairness of the DRB process.

II. Petitioner's Alleged Status As A Juvenile Does Not Change the Constitutional Analysis.

Petitioner further asserts that because he was allegedly 14 years old at the time of his capture and is 17 years old today, he is entitled to the privilege of the writ of habeas corpus.[5]

[5] In their opening brief, Respondents indicated that DoD's record reflects that Petitioner is 19 years old. *See* Harward Decl. ¶ 15. Petitioner has now submitted a declaration by an assistant of his counsel, asserting that he 17 years old today. *See* Ex. 12 to Petr's Opp'n. The declaration also attached a school record, hand-written in English on a printed form, with Petitioner's date of birth. *Id.* There is, however, no need for this Court to resolve this factual dispute because, as discussed elsewhere, Petitioner's age, whether at the time of his capture in 2008 or now, is irrelevant to the jurisdictional question before the Court.

According to Petitioner, if he is in fact determined to be a juvenile during the habeas proceeding, then he should be released from detention. There is, of course, no support for such extraordinary propositions. While Petitioner's opposition provides an extensive discussion of the history of the writ as applied to minors, *see* Petr's Opp'n at 17-19, such history has nothing to do with the extraterritorial application of the Suspension Clause. The latter is determined in this case by the considerations articulated by the Supreme Court in *Boumediene* and *Eisentrager* regarding the detention of aliens in an armed conflict.

To be sure, *Boumediene*, *Eisentrager* and *Maqaleh* did not involve minors, but there is no basis to argue that a detainee's status as a minor should be a factor in determining the reach of the Suspension Clause, any more than if a detainee is elderly or suffers from a physical or mental disability, among other characteristics. The determination that an alien is detainable under the Authorization for Use for Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), as informed by the laws of war, is not a determination of criminal culpability. Nor is a belligerent's detention a criminal punishment. While the Detainee Review Board may and does take into account a detainee's age in assessing threat level as well as the potential for rehabilitation and reconciliation, as already discussed above ultimately the purpose of the detention is to prevent a belligerent from returning to the battlefield and to deprive the enemy of the fighters needed to conduct further attacks. *See Hamdi,* 542 U.S. at 518; Harward Decl. ¶ 7. The constitutional analysis of the reach of the Suspension Clause already takes into account what process is available to determine a detainee's status as an enemy belligerent. There is no support for the proposition that a detainee's allegation of juvenile status should tip the constitutional analysis.

Petitioner also devotes significant energy to surveying the laws of war regarding minors; the increased importance placed by the international community on the involvement of children

in armed conflict; the United States's condemnation of the use of child soldiers in contravention of applicable international law; and the treatment of minors under U.S. civil and criminal laws.[6] *See* Petr's Opp'n at 21-30. According to Petitioner, "child status is an overarching factor in determining critical issues of detainability," *id.* at 26, and thus, it necessarily follows that this Court has jurisdiction to hear the habeas petition of a minor.

Petitioner is wrong for two primary reasons. First, his argument conflates the legality of his detention with the threshold issue of whether he can invoke the Suspension Clause to challenge his detention. Supreme Court precedent provides no support for the proposition that the extraterritorial reach of the Suspension Clause with regards to aliens depends on whether the alien is detainable under the laws of war or otherwise. In fact, this argument would put the cart before the horse. Second, even if the issue of detainability were relevant to the jurisdictional analysis, the age of a belligerent does not itself preclude lawful detention under the AUMF, as informed by the laws of war. Indeed, it was widely known that Taliban forces in Afghanistan included juveniles. The UN Secretary General had reported to the Security Council on the use of child soldiers in Afghanistan, including students "as young as 14 years old" fighting on the side of Taliban forces.[7] The prevalence of juvenile belligerents in Afghanistan had also been

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[6] For example, Petitioner cites the Federal Juvenile Delinquency Act ("JDA"), 18 U.S.C. § 5031, *et seq.*, for the various procedural protections accorded to juveniles being prosecuted for a crime. Petr's Opp'n at 28. He posits that these procedural protections are applicable to him because the general presumption against a law's extraterritorial application does not apply here in light of the United States' exclusive control over Bagram. *Id.* at 29 n.11. Petitioner's argument is circular and irrelevant to the question of jurisdiction. The Court of Appeals has already rejected the argument that the United States has *de facto* sovereignty over Bagram. Moreover, JDA is inapplicable to Petitioner also because it is expressly limited to criminal proceedings brought in a court of the United States. *See* 18 U.S.C. § 3502.

[7] United Nations General Assembly Security Council, Report of the Secretary-General, The Situation in Afghanistan and its Implications for International Peace and Security 7, 9 (Sept.

publicized by non-governmental organizations, which reported how children had been used throughout the 20-year war in Afghanistan against Soviet forces and described the recruitment by the Taliban of child soldiers from religious schools in Pakistan and Afghanistan.[8] In congressional hearings and floor debate, various members of Congress also decried the Taliban's use of child soldiers.[9]

Congress has not chosen to exclude juveniles from the scope of the President's detention authority. Indeed, such an exclusion would have significantly handicapped U.S. forces in their fight against al Qaeda, the Taliban and their associated forces. If the United States is unable to employ preventive detention as a means of protecting against juvenile belligerents, then enemy forces would be encouraged to recruit even more juvenile fighters, who could quickly return to active hostilities following their capture and release. In other words, the fact that an enemy solider may be under the age of 18 when he commits hostile acts against U.S. forces has no bearing on the military's need to detain him because, again, the purpose of detention is to disable the enemy fighters while active hostilities are ongoing.

Historical and contemporary practice of other nations indicates that the detention of juvenile enemy belligerents has been, and remains to this day, a necessary and accepted incident of warfare. The United States held juvenile enemy soldiers in military detention during the

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21, 1999), U.N. Doc. S/1999/994 (*available at* http://www.un.org/Docs/sc/reports/1999/sgrep99.htm) (last accessed Feb. 14, 2011).

[8] *See, e.g.*, Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report 2001 (*available at* http://www.child-soldiers.org/library/global-reports?root_id=159&directory_id=215) (last accessed Feb. 14, 2011).

[9] *See, e.g.*, 147 Cong. Rec. S11105-02, S11108 (daily ed. Oct. 25, 2001) (statement of Sen. Feinstein) (describing long history of warfare in Afghanistan including the use of "child soldiers"); *see also* Senate Committee on Foreign Relations, Hearing on Protocols on Child Soldiers and Sale of Children (Treaty Doc. 106-37), at 20 (Mar. 7, 2002), Exec. Rep. 107-4.

Vietnam War,[10] as well as during World War II.[11] Juveniles have also been prosecuted for crimes in violation of the laws of war.[12] Regrettably, the use of child soldiers in hostilities remains widespread in modern practice, thus necessitating the detention of juvenile enemy fighters. Between 2001 and 2004, armed hostilities involving people under the age of 18 occurred in more than 20 countries, including Afghanistan and Iraq.[13] By 2008, tens of thousands of children continue to remain in or have been newly recruited and used in armed conflicts – primarily by non-state armed groups.[14] Significantly, these minors have frequently been subject to detention by opposing forces or peacekeeping troops. In May 2008, the United States reported to the United Nation's Committee on the Rights of the Child that between 2002 and the time of the report in 2008, during combat operations in Iraq and Afghanistan, the United States captured and detained approximately 2,500 individuals who were under the age of 18 at the time of their capture.[15]

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[10] *See* Prugh, Vietnam Studies: Law of War 67 (1975).

[11] *See* H.W. Koch, *The Hitler Youth: Origins and Development, 1922-45* 245-248 (1976); C. Luther, *Blood and Honor: The History of the 12th SS Panzer Division 'Hitler Youth,' 1943-1945*, 58-59, 240-241, 243 (1987).

[12] For example, the British Military Court at Borken, Germany prosecuted a 15-year-old member of the Hitler Youth for his involvement in the murder of a Royal Air Force Officer. *See Trial of Juhannes Oenning & Emil Nix*, Case No. 67, XI L. Rep. Trials of War Criminals 74 (1945); *see also Trial of Alois & Anna Bommer & Their Daughters*, IX L. Rep. Trials of War Criminals 62, 66 (1947) (trial by Permanent Military Tribunal at Metz of a German family, including three juvenile daughters, for crimes in violation of the laws of war).

[13] *See* Coalition to Stop the Use of Child Soldiers, Child Soldiers: Global Report 2004, at 13 (*available at* http://www.child-soldiers.org/library/global-reports).

[14] *See* Coalition to Stop the Use of Child Soldiers, Child Soldiers: Global Report 2008, at 9 (*available at* http://www.child-soldiers.org/library/global-reports).

[15] United States Written Response to Questions Asked by the Committee on the Rights of the Child, Question No. 12 (5/13/2008) (noting U.S. captures and detentions of juveniles in

Finally, to the extent that international instruments address explicitly the question of military detention of juvenile belligerents, they make clear that detention of juveniles is contemplated, whether or not such juveniles' participation in active hostilities violates age restrictions applicable to the Nations or groups employing them. The Additional Protocols to the Geneva Conventions,[16] for example, impose requirements for conditions of confinement and other protections if children are detained or interned for reasons related to the armed conflict.[17] The Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict similarly does not prohibit detention of those considered to be child soldiers under its terms. As the United States explained in its 2010 report to the United Nation's Committee on the Rights of the Child, in a conflict "where terrorists recruit and exploit children to send them into harm's way deliberately, the detention of juveniles becomes an unavoidable necessity and burden." "Indeed, the principal rationale for detaining combatants under the law of armed conflict is to protect them and to save lives by preventing them from returning to the fight."[18] In sum, there is simply no support for Petitioner's suggestion that his alleged status as a

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the course of combat operations in Afghanistan and Iraq) (*available at* http://2001-2009.state.gov /g/drl/rls/105437.htm) (last accessed Feb. 14, 2011).

[16] The United States has signed but not ratified the Additional Protocols. Also, as discussed in Respondents' opening brief (at 12), even if Petitioner believes that the Additional Protocols support his claims here, Section 5 of MCA provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories." MCA, § 5, Pub. L. No. 109-366, 120 Stat. 2600, 2632 (codified at 28 U.S.C. 2241 note).

[17] Additional Protocol I, Art. 77(2), 77(3), 77(4); Additional Protocol II, Art. 4(3)(d), 5.

[18] *See* Periodic Report of the United States Concerning the Optional Protocol on the Involvement of Children in Armed Conflict (1/22/2010), at 47 (*available at* www.state.gov/documents/organization/135988.pdf).

juvenile confers jurisdiction on this Court or compels his release.

To the extent Petitioner attempts to apply the *Boumediene* factors at all for determining the reach of the Suspension Clause, his arguments again are premised on the erroneous assumption that a detainee's age is the single most critical factor. The habeas proceedings for (and counsel access to) juveniles, according to Petitioner, would not be unduly intrusive because "the threshold issue, if not the dispositive issue, would be proof of age" and because the issue of age is not "a particularly difficult question for a court to resolve." Petr's Opp'n at 31.[19] Military commanders would not feel any diminished prestige, Petitioner argues, if a court determines that the commander had erred in determining the detainee's age and the effect of that age on the detainee's detainability. *Id.* at 33. Ultimately, Petitioner argues that the practical obstacles for extending the writ to minors at Bagram are attenuated because the number of juveniles held at Bagram is likely to be small.

A detainee's age, however, is neither the threshold issue nor a necessarily relevant inquiry in a habeas proceeding. As already discussed above, the age of a belligerent does not itself preclude lawful detention. And, examining detainability in a federal habeas court is not as unobtrusive as Petitioner claims. Civil habeas litigation in a U.S. court would likely involve

[19] Petitioner suggests that physical appearance and "documents in the possession of a detainee (such as a passport)" will foreclose the issue of a detainee's age in many cases. Petr's Opp'n at 31, n.12. But putting aside those who carry false identifications, most individuals captured in this armed conflict neither know their date of birth nor carry identifications, much less passports, on their persons. *See Al Odah v. United States*, 648 F. Supp. 2d 1, 12 (D.D.C. 2009) (Discussing that al Qaeda's standard operating procedure requires those entering al Qaida and Taliban-associated guesthouses or safe-houses to surrender their passports, identification, money, or other travel documents, particularly if they were planning to attend a training camp, and as a result, many detainees were captured without passports or other identification), *affirmed by* 611 F.3d 8 (D.C. Cir. 2010), *cert. pet. pending* 79 U.S.L.W. 3228 (Sept. 28, 2010) (No. 10-439).

complex factual and legal issues going to the detention authority under the AUMF, as informed by the laws of war. Thus, not only is Petitioner's argument based on a false premise, but also, even a small number of habeas proceedings would constitute unacceptable burden on the military's mission. Indeed, were the number of potential habeas cases a relevant factor, the Court of Appeals would have decided *Maqaleh* differently, where the petitioners similarly argued for the extension of habeas to the allegedly small number of non-Afghans who alleged to have been captured outside Afghanistan.

In sum, the considerations underlying the Court of Appeals' decision in *Maqaleh* remain unchanged today, and accordingly, *Maqaleh* compels the conclusion that this Court has no jurisdiction to review the instant habeas petition.

CONCLUSION

For the foregoing reasons and the reasons stated in Respondents' opening brief, this Court should dismiss the First Amended Petition for Writ of Habeas Corpus for lack of subject matter jurisdiction.

Dated: February 14, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

JOHN R. TYLER
Assistant Branch Director

/s/ *Jean Lin*
JEAN LIN
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 514-3716
Attorneys for Respondents